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Nos. 97, 98, and 99

In the Supreme Court of the United States

OCTOBER TERM, 1962

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

BOSTON AND MAINE RAILROAD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (R. 3994–4005) is reported at 202 F. Supp. 830. The Commission's initial opinion (R. 3738–3820) is reported at 311 I.C.C. 689 and its opinion on reconsideration (R. 3836–3857) is reported at 314 I.C.C. 185.

JURISDICTION

The judgment of the three-judge district court (R. 4006) was entered on February 23, 1962. Timely notices of appeal were filed by the various appellants (R. 4007, 4020, 4024). The Court noted jurisdiction on June 11, 1962 (370 U.S. 914; R. 4027). The Court's jurisdiction on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b) and is sustained by

Interstate Commerce Commission v. *J-T Transport Co., Inc.*, 368 U.S. 81, and *United States* v. *Central Vermont Ry., Inc.*, 366 U.S. 272.

The United States, a statutory defendant in the court below, filed a neutral answer and did not appeal from the judgment. It is an appellee in this Court.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding Sections 1, 301, 901, and 1001 and Sections 1(5), 3(1)), 4(1), 15(7), and 15a(2) of the Interstate Commerce Act, 49 U.S.C. 1(5), 3(1), 4(1), 15(7), and 15a(2), are set forth in the Appendix, *infra*, pp. 49–53.

QUESTIONS PRESENTED

The so-called northern railroads filed a schedule of reduced rates on export-import traffic between the northern tier ports and differential territory. The Interstate Commerce Commission held the proposed rates unlawful on the ground that they "would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports" in violation of Section 3(1) of the Interstate Commerce Act. The questions presented are:

1. Whether the findings on which the Commission's conclusion of undue prejudice rests are identified with sufficient clarity and establish a rational basis for its decision.

2. Whether the district court erred in finding the proposed rates just and reasonable under Section 1(5) of the Act on the basis of its own evaluation of the evidence, where the Commission found the

record inadequate to determine whether the rates were even compensatory.

STATEMENT

These are appeals by southern railroads and port authorities and the Interstate Commerce Commission from a judgment of a three-judge district court setting aside and permanently enjoining enforcement of an order of the Commission. The order in question required appellee railroads to cancel tariffs that would have reduced rates on import and export traffic moving between New York, Boston, Albany and Portland, Maine (the northern tier ports) and differential territory, an area in north central United States (roughly the area north of the Ohio River, west of a line running between Buffalo and Pittsburgh, and east of the Mississippi).[1] The purpose of the rate reductions, which have now been ordered approved by the district court, was to eliminate the long-standing rate differentials on this traffic favoring Philadelphia, Baltimore and Hampton Roads (the southern tier ports).

1. BACKGROUND OF THE RATE DIFFERENTIALS.

This controversy stems from the continuing rivalry among the ports along the North Atlantic and the railroads serving them for the import and export traffic to and from differential territory. The railroads have for many years maintained a rate relationship under which, with respect to most of this traffic, the rail rates applicable to Baltimore and Hampton

[1] A more detailed description of differential territory is given in the Commission's original report (R. 3740–3741).

Roads[2] are three cents per 100 pounds below the rates to New York; the rates to Philadelphia are two cents below New York; and the rates to Boston are the same as those to New York. Philadelphia rates apply to Albany, and New York rates to Portland except on import traffic moving through Portland to the differential territory via Canada where Baltimore rates apply (R. 3741–3743).[3]

The rate relationship presently in effect derives from a voluntary agreement entered into in 1877 by four North Atlantic port railroads (R. 1903).[4] According to the Commission, the two objectives of the agreement were as follows (R. 3746):

> To avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia, and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through those cities. It provided also that rates to and from Boston should be no less than those to and from New York. * * *

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[2] The differential rates to the Hampton Roads ports apply only on that portion of differential territory which lies in the area west of the Sandusky (Ohio) line (R. 3741).

[3] Minor deviations from the rate pattern described above, such as the rates applicable to export grain and flour (as to which Baltimore is 1.5 and 2 cents respectively less than New York) and as to first-class and second-class traffic (as to which Baltimore is 8 cents less than New York), are set forth in the Commission's original report (R. 3741–3743).

[4] The 1877 agreement made the rate differential prescribed thereby applicable to both domestic and foreign traffic. A new basis for domestic rates was prescribed by the Commission in 1930. *Eastern Class-Rate Investigation*, 164 I.C.C. 314.

The relevance of the ocean rate-relationship between the northern and southern ports in establishing the rail differentials, as stated by the Commission, was as follows (R. 3744–3745):

> When the present differentials were established there were higher ocean rates to and from Baltimore and Philadelphia than to and from the northern tier ports. The differentials were designed, and their effect was, to compensate for the differences in these ocean rates in favor of the northern tier ports. Thus, they tended to produce equal total transportation charges between an interior point and the foreign origin or destination over all routes through the several ports, affording the different railroads and ports competitive rates.

Beginning in the early twenties and extending to about 1935, the ocean rates to and from the different ports were equalized (R. 3745). Consequently, the sum of the rail and ocean transportation charges through the northern tier ports served by the appellee carriers became higher than the sum of those charges through the southern tier ports served by the appellant roads by the amounts of the old differentials. Subsequently, a number of attempts have been made to eliminate aspects of the resulting differentials favoring the southern tier ports. See, *e.g.*, *Lighterage Cases*, 203 I.C.C. 481, 504; *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151; *Export Grain from Buffalo to New York*, 278 I.C.C. 31, 292 I.C.C. 647; *Iron Ore From Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 299 I.C.C. 195.

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2. THE ADMINISTRATIVE DECISION

By schedules filed to become effective July 10, 1956 and later, the railroads serving the northern tier ports[5] proposed to reduce their rates on export-import traffic (except iron ore,[6] coal and coke) be-

[5] These railroads include the New York Central which serves New York, Boston, and Albany; the Erie Railroad Company, The Delaware, Lackawanna and Western Railroad Company, and the Lehigh Valley Railroad Company which serve New York; The New York, New Haven and Hartford Railroad Company which serves New York and Boston; the Boston and Maine Railroad which serves Boston and Portland; the Maine Central Railroad Company which serves Portland, Maine; and the Grand Trunk Railway System Lines East and the New York, Susquehanna and Western Railroad Company which are connecting roads (see R. 3748-3749, 3994 n. 1). Since the administrative hearing, the Erie and the Lackawanna have merged (R. 3749).

The Maine Central reluctantly joined in the proposed reduced export rates to Portland in order to avoid having the highest rates to any United States Atlantic port if the rates proposed by the other appellee roads would be approved. It has, however, opposed the proposed import rates which would eliminate the present differential favoring import traffic through that port. Portland import rates are on the Baltimore level, which is three cents per hundred pounds below the rates to New York (R. 3749).

[6] A similar controversy presently exists as to differential rates on import iron ore and is the subject of separate proceedings which began in 1953. The history of those proceedings is contained in the following reports: *Iron Ore From Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 299 I.C.C. 195; *Baltimore & Ohio Railroad Co.* v. *United States*, 151 F. Supp. 258 (D. Md.); *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 355 U.S. 175; *Boston and Maine Railroad Co.* v. *United States*, 153 F. Supp. 952 (D. Mass.); *Report of the Commission on Second Further Hearing and Reconsideration*, 314 I.C.C. 149; *New York Central Railroad Co.* v. *United States*, 200 F. Supp. 944 (S.D. N.Y.); *New York Central*

tween those ports and the differential territory to the level prevailing between Baltimore and the differential territory.[7] The railroads serving the southern tier ports[8] thereupon countered with schedules to become effective if the rates proposed by the northern carriers were found lawful. The rate reductions they proposed corresponded in amount with those sought by the northern carriers (R. 3739–3740). Protests were filed by each side against the proposed reductions of the other and the various ports and other parties intervened in support of their respective interests. The Commission suspended all of the proposed rates pending investigation of their lawfulness and that suspension has been continued in effect by agreement of the carriers (R. 1–10).

a. *The Commission's Original Report*

After an administrative hearing, the Commission issued a lengthy report and order holding the reductions proposed by the northern carriers unlawful and

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Railroad Co. v. *United States*, 207 F. Supp. 483 (S.D. N.Y.); *Baltimore & Ohio Railroad Co.* v. *United States*, decided December 19, 1962, C.A. No. 13, 129 (D. Md.).

The iron ore controversy is now before the Commission on separate remands from the district courts in the last two of the cases cited above.

[7] The northern lines at the same time applied for authority to establish and maintain the proposed rates without observing the long-and-short-haul provisions of Section 4 of the Interstate Commerce Act (49 U.S.C. 4) (*infra*, pp. 50–51).

[8] These railroads are the Baltimore & Ohio and the Pennsylvania Railroad Company which serve Baltimore, Philadelphia, and New York; the Reading Company which serves Philadelphia; and the Western Maryland Railway Company which serves Baltimore. The protestants serving Hampton Roads are the Pennsylvania, the Chesapeake & Ohio, the Norfolk and Western Railway Company, and the Virginian Railway Company. Since the administrative hearing, the two last-named carriers have merged (R. 3748–3749).

ordering their cancellation (R. 3738–3821). In its report, the Commission first reviewed the history of the port differentials (R. 3743–3748) and the contentions of the parties for and against the reductions (R. 3749–3753). It then made findings concerning (1) the changing relative positions of the northern and southern tier ports with respect to all export-import traffic (R. 3754–3761)[9] and with respect to export-import traffic moving to and from the differential territory only (R. 3762–3768); (2) the factors affecting the amount of traffic moving through these competing ports, including such factors as the facilities and services available at the ports (R. 3768–3771, 3774–3781), the number and frequency of sailings (R. 3774) and the rate differentials (R. 3781–3791); and (3) the costs of rail transportation to the ports, with particular reference to whether the proposed rates would be compensatory (R. 3791–3798).[10]

[9] The relevant data in this respect were not limited to traffic carried solely by rail, nor to traffic which originated or terminated in differential territory. For these reasons, they were regarded by the Commission as having "little or no significance as an indication of the trends which the ports have experienced with respect to the traffic here concerned" (R. 3756).

[10] The rails serving the northern ports presented no cost evidence to support their proposed reduction in rates. They maintained that this was unnecessary because of the relatively small reductions involved and because they deemed a study of the costs neither feasible nor justified by the expense. They also contended that a showing of unit costs at New York would not be helpful because they would be based on a diminished traffic volume and reflected large investments in port facilities made when there was heavier traffic (R. 3791). However, the southern lines put in certain cost evidence to show that the proposed rates to and from New York would not be compensatory and the northern rails put in rebuttal evidence (R. 3792–3793).

The Commission also made findings with respect to the differences in the average distance between the differential territory and the several southern and northern tier ports as follows (R. 3773):

> The average of the short-line distances from class-rate base points in the affected territory is 698 miles to Baltimore, 750 miles to Philadelphia, 804 miles to New York, and 921 miles to Boston. The average distance between Hampton Roads ports and the affected territory is 883 miles, as compared with 853 miles between that territory and New York.

The short-line distances to Portland generally exceed those to any other northern Atlantic port (R. 3853). In connection with these findings, the Commission discussed the weight to be given the factor of distance in establishing the port rate structure. It noted that the distance disadvantages of the northern tier ports are much less than the substantial differences in distance to and from other ports which have a parity or near parity of rates, and stated that (R. 3772–3773):

> * * * considerable disregard of rail distances is characteristic of all port adjustments, as is [*sic*] was in the establishment of the rates here dealt with. See *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 696.* * *

The Commission adhered to its decision in an earlier case in which, in response to the suggestion that the port rate should be fixed in relation to location, it had observed (R. 3773):

> that traffic does not stop at the ports but moves to foreign destinations, that more important

> was the fact that as seaports the four large cities from Boston to Baltimore, inclusive, had a fundamental advantage of location which entitled them to participate in the foreign trade, and that the public interest required that this right be recognized. * * *

and had concluded that the "rates should be so adjusted that all the ports and the various lines serving them may fairly compete for this traffic.' * * *" *(Ibid.)*

The Commission rejected the reduced rates as unlawful on the ground that they "are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports" (R. 3806–3807). The basis for this holding is explained in the concluding section of the Commission's report entitled "Discussion and Conclusions" (R. 3804–3807). There the Commission noted that the existing rate structure was "established by voluntary agreement of the eastern railroads more than 80 years ago" and that it "was the purpose of that structure * * * that 'these ports shall all be kept open * * * for export business upon such terms that each one may fairly compete for it' " (R. 3804). It recognized that the amount of traffic moving through the particular ports is influenced not only by the extent of the rate differentials, but also by other factors, including the availability of rail and port services and the frequency of ocean service.

While recognizing the impact of these other factors, the Commission found that "a change in the differentials could be expected to cause a shift in a substantial volume of the traffic" (*ibid.*). At the same time, it said, "we are unable to find support for the assertion that the disparity in through charges thus created [*i.e.*, by the equalization of ocean rates] has diverted traffic from the northern tier ports, to the disadvantage of the [northern carriers]" (R. 3804–3805).

The Commission held that "the burden of establishlishing the need for such a change rests upon the proponents * * *" and noted that the instant case is unlike *Export Grain from Buffalo to New York*, 278 I.C.C. 31, 292 I.C.C. 647, where the northern carriers were allowed to reduce to the Baltimore level their rates on ex-lake grain for export from Buffalo to the northern tier ports. In that case, "we found 'abundant evidence of the dominant position' of the southern tier ports and a clear indication that New York particularly, had suffered a substantial loss of tonnage in its competition for the ex-lake grain traffic. By contrast, the claims made here * * * of diminishing volume * * * since equalization of the ocean rates was effected, and that these traffic losses are attributable to the differentials, are not supported by impressive evidence" (R. 3805).

It found that the northern tier ports, "as a group," do not need the lower rates in order to compete; that New York, because of its many port advantages, was able to attract most of the highly desirable general

cargo,[11] in spite of the disadvantage of the higher rail rates; and that allowance of the rate reduction would result in an undue diversion of traffic to New York from the southern tier ports, especially of bulk cargo traffic on which those ports heavily depend (*ibid.*), and the movement of which is more sensitive to rate changes (R. 3800).[12]

In its conclusions, the Commission also referred to the retaliatory rate reductions which were proposed by the southern lines in the event that the reductions proposed by the northern lines were found lawful. It said (R. 3805–3806):

> The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their

[11] (R. 3753): "Ocean-borne commerce is classified into two types of cargo. By far the largest in volume is bulk cargo. It consists generally of low-value, heavy-volume raw materials which are handled at the port by mechanical facilities and provide bottom loading for ships or may move as full cargoes. The other type, called general cargo, includes principally manufactured and semimanufactured goods of relatively high value, which are usually packaged. General cargo generally constitutes the more profitable 'top loading' for ships in a balanced cargo operation."

[12] Because of its low value, bulk cargo is sensitive to transportation cost and its movement is more readily influenced by the differential than is the movement of general cargo (R. 3800).

lowest possible level and in a needless dissipation of carrier revenues.[13]

It said that, having been given power to fix rates for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers, it would be remiss in its duties if it approved the reductions (*ibid.*).

While the Commission stated that the cost of service to and from the northern tier ports was higher (R. 3806), it made no finding that the reduced rates would not be compensatory. It said that the evidence as to costs was inadequate "to determine whether the proposed rates would be reasonably compensatory * * *" (R. 3797). Such evidence as was presented indicated that with respect to New York traffic "the revenue from the proposed rates would equal" or exceed by a very small margin the estimated out-of-pocket costs" (*ibid.*).

The order entered by the Commission required the northern carriers to cancel the schedules proposing the parity rates and denied the application for fourth-section relief (R. 3821).

b. *The Commission's Report on Reconsideration*

In the district court action brought to set aside the Commission's order, the answer of the United States

[13] Although the Commission stated as an ultimate conclusion that the rate counterproposal of the southern lines is "not shown to be just and reasonable" (R. 3807), the Commission did not in fact make any findings regarding the validity of the counterproposal. It said, "In view of our conclusions herein, the evidence presented in support of the counter proposal need not be considered" (R. 3753).

admitted that the Commission had erred in failing to consider "separately and independently for each northern tier port, the lawfulness of the proposed rates as applied to the traffic to and from each of said ports" (R. 3834–3835).[14] The Commission thereafter reopened the proceedings "for reconsideration on the present record of the lawfulness of the proposed rates separately and independently on traffic to and from each northern tier port" (R. 3835–3836).

In its report on reconsideration (R. 3836–3855), the Commission concluded that the proposed rates to the northern tier ports both "separately and collectively * * * would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports" (R. 3855). It reiterated that "so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports" (R. 3854). "[S]o far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of these ports" (*ibid.*). In this connection, the Commission reasoned, as it had previously, that factors other than the rate differential were the principal cause of the inability of these ports to secure more traffic. It again concluded that New York, because of its many port advantages, would be the primary beneficiary under a regime of equalized rates (R. 3844–3853).

[14] The answer of the United States neither admitted nor denied the other errors asserted in the complaint (R. 3823–3832).

As to the importance of distance as a consideration in the rate relationship, the Commission again acknowledged that departures from distance-based rates are characteristic of many port rate structures, and that "the present rates reflect substantial deviation from relative distances" (R. 3854). It stated, however, that those opposed to rate parity have strong claims based on "geographical, transportation and cost advantages" (*ibid.*). Referring specifically to the distance disadvantages of Boston in relation to Baltimore, Philadelphia and New York, and that of the latter port in relation to Baltimore, the Commission said (*ibid.*):

> Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of section 3(1) of the act. What has just been said applies also, in greater or less degree, to each of the other northern tier ports.

3. THE DISTRICT COURT DECISION

The district court set aside and permanently enjoined enforcement of the Commission order "insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from * * * [the northern tier ports], denies fourth-section [relief] * * * and prevents differential-eliminating rates from becoming effective" (R. 4006). The court, although acknowledging that the Commission had "refused to find the [proposed] rates compensatory," ruled that the northern lines had "certainly established prima facie that the proposed rate schedule is just and reasonable" (R. 4001).

The court held that, in disapproving the proposed rates on the ground that they would cause undue prejudice to the southern tier ports and give undue preference to the northern ports, the Commission had misapplied Section 3(1). It erred, the court said, by focussing unduly on the needs of the ports without giving due weight to the interests of shippers, receivers, carriers and inland localities (R. 4001–4003). The court held further that the Commission was not justified in relying on the distance disadvantage of the northern tier ports as the single basis for its conclusion that the proposed rates would violate Section 3(1) because (1) distance played no part originally in establishing the differential; (2) the Commission itself has "continually adhered to the proposition that distance plays no part in the determination of port differentials"; (3) the Commission is inconsistent in its application of the distance factor in the instant case; (4) "the present differentials do not in any way reflect the distance differences"; (5) the emphasis on distance was contrary to one of the purposes of the 1935 amendment to Section 3(1), which was "to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available"; (6) "[d]istance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads * * *, but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings" (R. 4003–4004). Having rejected this

"single subsidiary finding" on which the Commission relied, the court ruled that the Commission's "conclusion lacks the required basic findings to support it" (R. 4003–4004).

Finally, the court ruled that the Commission's finding that equalization would not materially affect the flow of traffic to the northern tier ports other than New York is inconsistent with the Commission's conclusion that parity would cause undue prejudice to the southern tier ports (R. 4005).

INTRODUCTION AND SUMMARY

This case presents an old but important controversy—the dispute over the port differentials which establish the railroad rate relationships on traffic to and from the North Atlantic ports. The northern roads proposed that their rates on all import and export traffic—except for iron ore, coal and coke—between the differential territory and the northern tier ports be reduced by one to three cents per hundred pounds to place them on a parity with the rates between that territory and Baltimore and Hampton Roads, southern tier ports. The southern roads responded by filing reductions which would restore the existing differentials in the event the northern tariffs were approved. Thousands of different rates are involved covering virtually every item of export or import traffic carried by the railroads. Millions of dollars in direct rail revenues and related port payrolls will be affected by the decision, as well as patterns of traffic developed since the mid-1800's. Above all, the decision will have bearing upon the future of

the eastern railroads, the Atlantic seaports and the great cities which depend upon them.

Because of this myriad of intense and conflicting interests, the port differential cases have historically been among the most difficult for the Commission as well as the courts. See, *e.g.*, *In the Matter of Differential Freight Rates to and from North Atlantic Ports*, 11 I.C.C. 13; *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. Co.*, 24 I.C.C. 55; *Maritime Assn. of Boston Chamber of Commerce* v. *Ann Arbor R. Co.*, 95 I.C.C. 539; *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691; *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *Port of New York Authority* v. *Baltimore & Ohio R. Co.*, 248 I.C.C. 165; *Export Grain from Buffalo to New York*, 278 I.C.C. 31 (1950), order enjoined in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (D. Mass.), affirmed, 342 U.S. 890, same case on remand, 292 I.C.C. 647. See also the cases cited *supra*, p. 6, n. 6.

It was to provide a forum and an arbitrator for the solution of just such technical and complex matters as this that the Interstate Commerce Commission was created by Congress. *Board of Trade* v. *United States*, 314 U.S. 534, 546. It has been given the powers to deal with the issues presented in these disputes and must necessarily be afforded wide discretion in formulating appropriate solutions. See *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652; *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592–593; *New York* v. *United States*, 331 U.S. 284, 331, 335; *Board of Trade* v. *United States*, *supra*

at 546–548. However, the very magnitude of the Commission's task emphasizes the necessity that it make adequate findings and spell out with clarity the essential facts upon which its decision rests. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168; *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 510–511.

In the view of the United States, the Commission's decision does not meet this requirement. We shall urge below that the Commission's report suffers from deficiencies in the following respects:

It lumps together relevant and irrelevant findings without sufficient identification of those which determined its conclusion that the rate reductions proposed by the northern carriers would unduly prefer the northern tier ports and unduly prejudice the southern tier ports in violation of Section 3(1) of the Interstate Commerce Act. The findings upon which the Commission appeared to rely do not provide a rational basis for its conclusion.

Thus, the Commission held that the distance disadvantages of the northern tier ports cannot be ignored without causing undue preference and prejudice. However, it did not explain why these disadvantages, frequently disregarded in the setting of port differentials and ignored by the Commission in its initial report herein, were determinative on reconsideration. The existing differentials do not reflect important distance differences and their retention is inconsistent with the Commission's suggestion that these port rates must follow distance.

The Commission made a similar departure from past practice in holding that Section 3(1) requires it to give effect to the cost advantages of the southern ports. We do not question the relevance of the cost factors. The Commission, however, failed to determine the extent of the differences among the costs of service to the various ports—making no findings as to Portland, Albany and Hampton Roads—and gave no explanation why any cost advantages which do exist are given proper effect by maintaining the existing rate differentials.

The Commission placed reliance on the relative competitive advantages of the ports. However, its findings as to the comparative advantages of Boston, Albany and Portland vis-a-vis the various southern tier ports were inadequate. It did not explain why, if New York's competitive advantages require maintenance of its rate disadvantage vis-a-vis the southern ports, the apparent competitive disadvantages of Boston, Portland and Albany do not warrant a reduction in their existing rate disadvantages.

Finally, the Commission appeared to rely in part upon an assumption that approval of the reductions proposed by the northern carriers would set off a rate war. Even if true, this assumption would be irrelevant to a determination whether the proposed reductions would cause undue preference and prejudice. Beyond this, however, the Commission failed to make findings to support its assumption. Thus, the rate war threat warranted no consideration even under sections of the Act to which, if substantiated, it would be relevant.

For these reasons, we believe that the report was properly set aside by the court below. However, in the circumstances of this case, where the approval or rejection of the rates necessarily depends upon an evaluation of numberless technical factors and their interrelationships and where the decision will have such far-reaching consequences, the court should have remanded the case to the Commission to determine whether, in light of the court's opinion, the evidence warrants a different result and, in any event, to make proper findings in support of its conclusion.

In addition, we believe that the court erred in a second respect. Because the Commission concluded that the proposed reduced rates were unlawful under Section 3(1) of the Interstate Commerce Act (*infra*, p. 50), it never reached the question whether, as required by Section 1(5) of the Act (*infra*, pp. 49–50), they were just and reasonable. In fact, the Commission's report stated that the evidence was inadequate to permit a determination whether the proposed rates were even compensatory (R. 3797). Under the Act, it is the Commission's primary responsibility to determine whether proposed rates have been shown to be reasonably compensatory. *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481. The court, by proceeding to make its own determination prior to any ruling by the Commission and upon a record found inadequate by the Commission, improperly invaded the province of the administrative agency. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88.

ARGUMENT

I

THE COMMISSION'S FINDINGS LUMP TOGETHER THE RELEVANT AND THE IRRELEVANT AND DO NOT PROVIDE A RATIONAL BASIS FOR ITS CONCLUSION OF UNDUE PREFERENCE AND PREJUDICE

The Commission held the rate reductions proposed by the northern carriers unlawful on the ground that they "separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports" (R. 3855). In so holding, the Commission was acting pursuant to Section 3(1) of the Interstate Commerce Act (*infra*, p. 50) which provides:

> It shall be unlawful for any common carrier * * * to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * *, [or] port * * * in any respect whatsoever; or to subject any particular person * * *, [or] port * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

"Section 3 is a broad charter, giving the Commission wide latitude of definition." *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 492 (S.D. N.Y.) (Friendly, J., in setting aside the Commission's ruling of undue preference and prejudice in the iron ore port differential case). This Court has held that in the application of Section 3(1)

"the administrative rate-maker is left with broad discretion * * *" "to accommodate the factors of transportation conditions, distance and competition * * *. That is a task peculiarly for it. * * * there is no place for dogma or rigid formulae." *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593. See, also, *Board of Trade* v. *United States*, 314 U.S. 534, 546–548.

On the other hand, this Court has time and again admonished the Commission to spell out and identify the findings deemed essential to its conclusion and to do so with an adequacy which will leave the Court reasonably certain of the Commission's grounds. For only by so doing will the Court be enabled to perform its role of determining whether there was a rational basis for the Commission's conclusion. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 510–511. *United States* v. *Baltimore & Ohio R. Co.*, 293 U.S. 454, 463; *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U.S. 74, 86–87; *Florida* v. *United States*, 282 U.S. 194, 215. This admonition was reiterated recently in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167–168, in which the Court stated:

> The Commission must exercise its discretion * * * within the bounds expressed by the [statutory] standard * * *. And for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." * * * The agency must

> make findings that support its decision, and those findings must be supported by substantial evidence. * * *. [and] articulate [the] rational connection between the facts found and the choice made. * * *

As we read the Commission's report, its decision of undue preference and prejudice rests upon some combination of one or more of four factors: (1) the distance advantages of certain of the southern tier ports; (2) the "firmly established" "higher costs of service to and from those [northern] ports" (R. 3806); (3) the great competitive advantages of the port of New York and the competitive disadvantages of the other northern tier ports; and (4) the threat that approval of the proposed reductions would require alternate approval of the counter-reductions proposed by the southern carriers, resulting in a needless dissipation of carrier revenues. We will analyze each factor and show that no one factor standing alone nor any combination discernible from the Commission's report provides a rational basis for the holding. We also suggest that the Commission's ultimate conclusions as to comparative costs and port advantages are not supported by sufficient subsidiary findings and that the assumed threat of a rate war has no relevance to a determination of undue preference and prejudice.

A. THE COMMISSION'S DECISION DOES NOT REVEAL THE BASIS FOR ITS DETERMINATION THAT THE DISTANCE DISADVANTAGES OF THE NORTHERN TIER PORTS CANNOT BE IGNORED WITHOUT CAUSING UNDUE PREFERENCE AND PREJUDICE

Distance is indeed one of the variables in the equation which determines the issue of undue preference

and prejudice. *Ayrshire Collieries Corp.* v. *United States, supra.*[15] Of course, not every difference need be, or indeed ever has been, reflected by a corresponding difference in rates. As Judge Friendly said in the related port differential case involving iron ore (*New York Central Railroad Co.* v. *United States,* 207 F. Supp. 483, 490 (S.D.N.Y.)):

> It is undeniable that unlawful discrimination can be effected as readily by giving more transportation for the same price as by charging a higher price for the same transportation * * *. However, the Commission has never adopted a doctrinaire position that any failure to bring rail charges into exact accord with differences in distance is a preference or prejudice, much less an undue one. One reason is that although distance must have some effect on rail transport costs, the relationship is by no means direct. Even on transportation in the same direction over the same line, a heavy proportion of total costs is represented by originating and terminating expenses, as well as overhead expenses, such as accounting, which do not vary with mileage. When different carriers are involved, still other factors enter into the comparison. Neither has the Commission ever insisted that rates to or from competing markets or ports should cover cost by precisely the same margin. Hence the fact that differentials based on longer mileage and higher cost may not be an undue prejudice to the higher rated

[15] Accordingly, we believe that the district court was in error when it stated "* * * the Commission, itself, has continually adhered to the proposition that distance plays no part in the determination of the port differentials" (R. 4003).

> port has never been thought to mean, in and of itself, that equalization would unduly prejudice the formerly lower rated one.

In addition, distance differences, standing alone, cannot determine whether an existing differential is fair or whether a change would cause an undue prejudice.

In this case, the Commission's definition of the role of distance in its determination is neither clear nor consistent. In its original report the Commission specifically considered, under a separate heading, the "Weight to be accorded the distance element" (R. 3772). It said, in response to a contention emphasizing the southern tier ports' distance advantage, "that considerable disregard of rail distances is characteristic of all port adjustments, as [it] was in the establishment of the rates here dealt with" (R. 3773). It also noted that "[s]uch distance disadvantages as [the northern tier ports] have are much less than the substantial differences in distances to and from some other ports which have a parity or near parity of rates * * *." (R. 3772.) "[P]ort rates," it stressed (quoting from one of its earlier decisions), "are not distance rates" (R. 3773). Except for a passing reference to "the greater distance of the northern tier ports * * *" (R. 3805–3806) made as part of its conclusion that approval of the northern rates would require approval of the retaliatory southern reductions—letting loose a rate war—the Commission made *no* mention of the distance differences in the "Discussion and Conclusions" supporting its original determination of undue preference and prejudice.

Yet, the Commission's report on reconsideration appears to rest upon these same distance differences with virtually no explanation of the change in emphasis. Thus, the Commission again acknowledged that "the present rates reflect substantial deviation from relative distances * * * characteristic of many port rate structures" (R. 3854). But it then proceeded to reject the characteristic approach (*ibid.*) (emphasis added):

> The situation before us here differs. While in the instant proceeding there is strong insistence by the respondents and the ports supporting them upon rate parity, equally strong are the claims of their opponents, fully substantiated of record, as to the opponents' geographical, transportation, and cost advantages. * * * Here, as stated, the distance disadvantages of Boston, for example, are 223 miles over Baltimore, 171 miles over Philadelphia, and 117 miles over New York; and the latter port is 106 miles more distant than Baltimore. *Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of section 3(1) of the act.* * * *

The Commission failed to spell out what the circumstances are in this case which make it a violation of Section 3(1) for the carriers' rates to fail to give recognition to differences in distance. If the "geographical, transportation, and cost advantages" of those opposed to rate parity are "the circumstances" which the Commission meant, we are no better informed for the Commission never identified what

these advantages are, how they differ from other port cases where these advantages have been disregarded, and what the relationship is between these advantages and the existing differentials.

If, despite the statement that other "circumstances here revealed" required it to give effect to the distance advantages, distance alone was determinative, the Commission's report is still inexplicably inconsistent. Hampton Roads is further away from differential territory than New York (R. 3773). Except as to certain points in Michigan, Portland is further away from differential territory than any of the other ports (R. 3853). Nevertheless, Hampton Roads (on export and import traffic to differential territory), and Portland (on import traffic to differential territory via Canada), enjoy the same favorable rate differential as Baltimore. If Section 3(1) requires that distance differences be given effect, the Commission's decision should explain why they bar parity in this case but permit it in these others which appear indistinguishable.

In the companion proceeding involving iron ore only, the difference in distance was also one of the findings relied on by the Commission in support of its conclusion of undue preference and prejudice and its consequent disallowance of rate parity. The Commission's explanation relating to this finding was held to be inadequate by the three-judge court in *New York Central Railroad Co. v. United States*, 207 F. Supp. 483 (S.D. N.Y.). The court, after reviewing Commission decisions dealing with rates on import and export

traffic, made comments which are applicable here. It said (207 F. Supp., at 492):

> We do not say that these past pronouncements bind the Commission forever and that it may not lawfully adopt a policy that equalization of import rates for interior distances differing as significantly as here violates § 3 * * *. If the Commission has reached the considered conclusions that present conditions in the railroad industry demand a closer correspondence of rates to costs, so that departures from a uniform relationship, which have previously been tolerated or even encouraged to promote port competition, shall now be deemed "undue or unreasonable," it is free to say so. But we cannot find in the instant report, * * * either any such general pronouncement or any sufficient statement of reason why the Commission here departed from a construction of § 3 to which it has generally adhered for more than half a century and has previously applied to these very rates. Before we can sustain a conclusion of violation of § 3, the Commission must explain it with a clarity and make supporting findings with a specificity beyond the instant report. *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954).[16]

[16] These comments of Judge Friendly apply notwithstanding his statement that the "iron ore" case differed significantly from the instant one in which "the record showed a preponderant movement through the northern ports despite the differentially higher rail rates * * *" (207 F. Supp. at 488). This statement was made with respect to the Commission's findings in the original report in the instant case which treated the northern tier ports as a group and thus applied considerations applicable exclusively to New York to the other northern tier

B. THE COMMISSION'S FINDINGS ARE INADEQUATE TO SUPPORT ITS CONCLUSION THAT BECAUSE OF THE "COST ADVANTAGES" OF THE SOUTHERN TIER PORTS, THEIR DISTANCE ADVANTAGES "MAY NOT BE IGNORED WITHOUT RUNNING COUNTER TO THE PROVISION OF SECTION 3(1) OF THE ACT"

In its original report, the Commission does not appear to have relied on cost comparisons as a basis for its conclusion of undue preference and prejudice, although it did describe some evidence adduced by the parties with respect to costs (R. 3791–3798). In the "Discussion and Conclusions" section of that report, the Commission made only one reference to "the higher costs of service" to the northern tier ports (R. 3806), and this was made not to show that the rate reductions would be unlawfully discriminatory because they failed to reflect cost differences, but to show that because of the cost differences the Commission would be unable to deny the counter-reductions proposed by the southern carriers.

In the Commission's report on reconsideration, however, the Commission appears to have placed major reliance on cost comparisons in reaching its conclusions. As noted, it held that under Section 3(1) it was bound to recognize the distance advantages of the southern tier ports "under the circumstances here revealed." It identified those circumstances as the

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ports. While the Commission found that a preponderance of traffic moves through New York, it made no such finding as to Boston, Albany or Portland either in the original report or on reconsideration. In fact, the Commission acknowledged their insignificant share of the relevant traffic (R. 3783–3789, 3847–3853). Hence, the distinction referred to by Judge Friendly would not apply to the northern tier ports other than New York.

"geographical, transportation and cost advantages" of the opponents of the reductions and said that these advantages were "fully substantiated of record" (R. 3854). Since the only apparent meaning of "geographical" and "transportation" advantages is distance, the Commission's conclusion appears to rest essentially upon its finding that the southern ports possess cost advantages."

These important cost relationships were not adequately treated. The proponents of the reductions presented no cost evidence (R. 3791). They took the position that because the port rates reflect relatively small reductions, "a study of the costs was * * * unnecessary * * *." In any event, they did not consider such a study feasible or justified by the expense involved (*ibid.*). In turn, the southern opponents of the reductions introduced evidence of their costs of performing service to and from the southern ports and New York as well as certain factors of the costs to and from Boston (R. 3793). The northern roads put in a limited amount of rebuttal evidence (R. 3792–3793).

The Commission did not require the presentation of additional cost data. Its finding that the southern ports possess cost advantages rests on three subsidiary

[11] While "transportation" advantages might be read to refer to comparisons among the rail, port and ocean services available at the ports, such a reading is precluded here by the Commission's finding that the advantages of New York in this respect exceed those of any other port (R. 3774–3781, 3806, 3850, 3854). If, however, the Commission meant "the circumstances here revealed" to refer to the competitive advantages of the northern tier ports, then these circumstances are still inadequate to provide a rational basis for its conclusion. See Section C, *infra*, pp. 34–37.

findings limited to out-of-pocket costs of service to certain of the ports:

(1) that the inland terminal cost of traffic to and from the ports is the same in all cases (R. 3793);

(2) that as of 1955 the line-haul average cost of service to and from Baltimore was below that for Philadephia, New York, and Boston (in that order) (*ibid.*);

(3) that as of September 1956 the port terminal costs of handling export-import traffic at Baltimore were below those of Boston, Philadelphia, and New York (in that order) (R. 3797–3798).

These findings form an inadequate basis for the Commission's conclusion that Section 3(1) requires it to give effect to distance differences by maintaining the existing rate differentials. First, the findings depend in large measure upon those very distance differences and so add little or no independent support for the Commission's conclusion. Thus, the line-haul costs to each port were obtained by multiplying the Rail Form A average unit costs for class I railroads in the eastern district as a group for the year 1955 by the average distance to and from the port (R. 3793). Since the same unit cost was used for each railroad, the costs varied precisely in relation to the distances.

Second, the cost comparisons are incomplete. Thus, on the evidence submitted, the Commission was unable to determine the fully distributed costs of service to and from the various ports and, accordingly, made no findings as to the differences in such costs. In fact, the Commission looked closely only at the evi-

dence of costs of service to and from New York (R. 3793).

Third, the Commission made no findings whatsoever as to the costs of service to and from Albany, Portland or Hampton Roads. Thus, the comparative cost advantages or disadvantages of these ports vis-a-vis others were unknown and afford no support for the Commission's conclusion.

Before giving cost comparisons a determinative weight, we believe the Commission should have evaluated, as to each of the ports—northern and southern—data as to fully distributed costs. Similarly, it would seem that the Commission might appropriately make findings as to whether the proposed reductions would increase the traffic carried by the northern roads so as to reduce their line-haul unit costs below the 1955 average and their port terminal costs below those of September 1956 and what effect the reductions would have on the per-unit costs of carriage by the southern roads.

The Commission's treatment of the cost differences raises a further question. "In no area has the Commission taken a less rigid attitude in requiring precise adjustment of rates to distance or even to costs than with respect to rates on import and export traffic." *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 490 (S.D. N.Y.). If the Commission, in the instant case meant to place greater reliance upon cost factors—an approach with which we would agree—it is all the more important that its conclusions should be grounded on adequate supporting findings.

including cost comparisons as to each of the northern and southern tier ports.

C. THE COMMISSION DID NOT ESTABLISH A RATIONAL CONNECTION BETWEEN THE RELATIVE COMPETITIVE ADVANTAGES OF THE VARIOUS PORTS AND ITS CONCLUSION OF UNDUE PREFERENCE AND PREJUDICE

The Commission's conclusion of undue preference and prejudice appears to rest heavily upon its subsidiary finding as to the competitive advantages of the port of New York as compared to the southern tier ports. It found that New York possessed a great many port advantages—vastly superior steamship services and port facilities (R. 3775-3781, 3798-3803). It found further that these advantages more than offset the disadvantage of higher rates and that, because of them, New York was able to secure more of the highly desirable general-cargo tonnage than all of the other parts combined (R. 3806).[18]

[18] In its original report, the Commission seems to have relied entirely on an assumption that New York is getting its fair share of the traffic and that the proposed rates would give it more than its fair share and therefore would unduly prejudice the southern tier ports.

If the sole basis of the Commission's conclusion of undue preference and prejudice was, in fact, the assumption that the proposed rates would give New York more, and southern tier ports less, than a fair share of the traffic, the Commission was proceeding on the theory that the Act gives it "an umpiring role over the fate of cities * * *." *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 494 (S.D. N.Y.). This is a power, however, which it has previously disclaimed, *Stoves, Ranges, Boilers, etc.*, 182 I.C.C. 59, 68, and which this Court has repeatedly rejected. *New York v. United States*, 331 U.S. 284; *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 637-

On the other hand, the Commission made no finding that any of the other northern tier ports—Albany, Boston and Portland—offered steamship services and port facilties superior to those available at the southern tier ports. In fact, the report indicates at several points that these other northern tier ports were at a disadvantage in this respect in relation to their southern competitors (R. 3848 (Albany), 3851 (Boston)).[19] These disadvantages, the Commission found, were reflected by the fact that each of these other northern tier ports had been able to obtain only an insignificant share of almost all types of traffic involved in this case (R. 3783–3789, 3847–3853).

638; *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46.

Even if the Act conferred on the Commission the broad power to allocate traffic, the Commission's conclusion would still be deficient for lack of adequate findings. For it made no findings that the present allocation of traffic is the desirable one, at least with respect to the northern tier ports other than New York. In its original report, it concluded merely (R. 3806) (emphasis added): "The present differentials have long served to retain a reasonable competitive relationship between the *principal port groups* and should be maintained." Furthermore if it had the power of allocation, it could prevent the retaliatory rate reduction (see Section D *infra*, pp. 37–41).

[19] Thus, a limited number of sailings from a port will deter shippers from using it and thereby cause further reductions in traffic. During a representative period the number of scheduled sailings were 473 at New York, 220 at Philadelphia, 242 at Baltimore, 175 at Hampton Roads, and 65 at Boston. On 47 of the 65, Boston was the first port of call to pick up export cargo, the least desirable schedule position (R. 3785).

Accordingly, insofar as the Commission's conclusion that it would be an undue preference and prejudice to deny the southern tier ports the benefit of their natural advantages of distance and the related advantages of cost rests on the competitive advantages of the northern tier ports, it is sustainable, on its own reasoning, only in the case of New York.[20] The rest of the northern ports have no comparable competitive advantages, but the Commission has nowhere explained the relation between their disadvantages and its conclusion that rate parity would give them an undue preference. In short, the Commission's reliance on competitive advantages can only be rationally explained if the northern tier ports are considered as a group and New York's competitive advantages attributed to each of the others. This, however, would be directly contrary to the Commission's approach on reconsideration where it purported to make its determination of undue preference and prejudice on the basis of considerations applicable individually to each of the northern tier ports (R. 3834–3836). It may be that the Commission, although considering the legality of the proposed reduction

[20] In our view, each port, so far as practicable, should be given an opportunity to realize its own advantages, whether the advantage is a natural one (*e.g.*, location or the possession of a good harbor) or a commercial one (*e.g.*, the availability of frequent sailings). We would not endorse the view that rates should be designed to cancel out inherent advantages. Whether this was the Commission's design is not made clear by its report.

separately as to each northern port, believed it was required to approve or disapprove the reductions as a group. If the Commission was acting pursuant to such an assumption, we believe it was in error. The Commission was free to approve reduced rates for one or more of the northern ports while disapproving them as to the others.

The Commission's finding that "so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of these ports" (R. 3854) appears to be inconsistent with its conclusion of undue preference and prejudice. A reduction which would not materially affect the flow of traffic to the northern ports could not, it would seem, either prefer them or prejudice the southern ports. This inconsistency suggests again that the Commission was proceeding on the erroneous assumption that it was required to treat all the northern tier ports alike—parity to all or to none.

D. THE POSSIBILITY THAT APPROVAL OF RATE PARITY MIGHT SET OFF A RATE WAR IS IRRELEVANT TO THE COMMISSION'S CONCLUSION OF UNDUE PREFERENCE AND PREJUDICE

In the "Discussion and Conclusions" of its original report, the Commission referred to the counter reductions proposed by the southern railroads and to its inability to prevent their taking effect in the event it approved the rates proposed by the north-

ern roads. It then emphasized the serious consequences to carrier revenues flowing from such a course, stating (R. 3805–3806):

> The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports, are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties. The present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained.

We believe that the Commission erred if it placed any reliance upon these suppositions concerning the threat of a rate war in reaching its conclusion of undue preference and prejudice. Assuming, *arguendo*, that the threat of a rate war might be relevant to a determination whether the proposed reductions would be unjust and unreasonable under Section 1(5) of the Act (see *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 496–497; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S., at 507–509), there is still no rational relationship between the possibility that an adjustment in rates may elicit

a similar move by competitors and a holding that the initial adjustment of rates would be unduly prejudicial to those competitors. Plainly, the possibility of a rate war has no bearing on the question whether the rates proposed by the northern carriers bear a fair relationship to the present rates on like traffic between the differential territory and the southern ports.

Beyond this, however, the Commission's statement that the reductions pose a threat of a rate war is not supported by sufficient findings. Therefore, even if the Commission had rested its disapproval of the rates on Section 1(5)—to which the rate war threat might be relevant—the Commission would not have been entitled to give weight to what was essentially no more than an assumption. The Commission's approach in this instance suffers from the same failings which this Court found in *United States v. Chicago, M., St. P. & P. R. Co., supra.* There, the Court held that the disruption and disturbance which the proposed rate reductions would cause was not a sufficient reason for denying the carrier the privilege of reaching out for a larger share of the business of transportation by reducing its rates. The Court pointed out (*id.* 509):

> The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. * * *

Here, while the Commission declared broadly that the existing relationship is a fair one, it failed to make the subsidiary findings to support the statement. Such findings would require, at a minimum, reasonably detailed cost-revenue comparisons on service to each of the ports, which were not made here. Furthermore, the Commission's assumption that it would be required to approve the counter-reductions filed by southern carriers is highly questionable if not wholly unsupported. The Commission specifically refrained from considering the evidence offered by the southern carriers in support of these rates (R. 3753). Therefore, it was not in a position to say whether it would have been required to approve them. Such a determination could only have been made in the light of the evidence as well as the pertinent provisions of the Act, including the national transportation policy and the provisions of Sections 1(5) and 15(a)(2). (Appendix, *infra*, pp. 49–50, 53).

Finally, there is no basis for the suggestion that the proposed reduced rates should be disapproved because they might result in a needless dissipation of carrier revenues. As noted, the Commission made no determination of the relationship between the fully-distributed costs of any of the carriers and the proposed rates. It did find that the rates would equal or exceed by a very small margin the estimated out-of-pocket costs on traffic to New York, but made no such review in relation to the other ports. As noted, the Commission did not review any evidence as to

the cost-revenue relationships involved in the southern roads' proposed counter-reductions. Without such findings there is no basis for holding that the reductions would effect a needless dissipation of carrier revenues.

E. THE COURT SHOULD REMAND THE CASE TO THE COMMISSION FOR THE MAKING OF ADEQUATE FINDINGS IN SUPPORT OF ITS CONCLUSION

The Commission has not made adequate findings to explain and support its conclusion that the proposed reductions would unduly prefer the northern tier ports and unduly prejudice the southern ports. It disclaimed reliance upon the distance differences standing alone but failed to indicate what other facts were determinative. It appeared to rely on the cost advantages of the southern roads but did not explain why they should be determinative here when they have not been controlling in the past. It gave weight to the inherent competitive advantages of New York but appeared to disregard the disadvantages of the other northern tier ports. It said it would be remiss in the performance of its duties if it approved the reductions because this would precipitate a rate war, but this factor should have been irrelevant to its determination of undue preference and prejudice.

Until the Commission indicates clearly which of these factors (and possibly others) were determinative and makes the necessary subsidiary findings to support its conclusions, no court can decide with assurance whether the decision to disapprove the rates has a rational foundation. Under the circumstances, we

believe the court below was correct in refusing to uphold the Commission's order. However, it should not have issued a permanent injunction against enforcement of the order but should have remanded the case to afford the Commission, which is charged with primary responsibility in this area, an opportunity to remedy the deficiencies. See, e.g., *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156; *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654; *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194, 209–210. Cf. *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 498 (S.D. N.Y.).

We suggest accordingly that it would be appropriate for this Court to remand the case to the Commission with instructions:

(1) To explain separately as to each northern port what the circumstances are which require the Commission in this case, in contrast to the practice in other cases, to give effect to the port's distance disadvantages vis-a-vis the southern tier ports by maintaining the existing rate differentials;

(2) To make findings as to the relationships among costs of service to and from each of the various ports and to explain the relevance of these cost relationships to its conclusions;

(3) To make findings as to the relationship between the competitive advantages of Boston, Albany and Portland vis-a-vis the southern tier ports and to explain the connection between these relationships and its conclusions;

(4) To determine whether the evidence supports the finding that the proposed reductions threaten to set off a rate war which would lead to an unnecessary dissipation of carrier revenues, and, if so, to consider whether this finding warrants approval or disapproval of the proposed rates under appropriate sections of the Interstate Commerce Act other than Section 3(1); and

(5) To determine whether the proposed reductions to one or more of the northern tier ports are lawful or unlawful under other pertinent provisions of the Act, if the Commission should find that the reductions are consistent with Section 3(1).

In addition, we believe that the Commission should be directed to make findings as to whether each of the northern carriers which filed reduced rates serves the various southern tier ports direct from the differential territory or through joint rates covering such service. This finding is a prerequisite to the Commission's jurisdiction under Section 3(1) which applies only where a carrier gives an undue preference between ports which it serves. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *New York* v. *United States*, 331 U.S. 284; *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573. We do not suggest that such jurisdictional facts are lacking here; but, since neither the Commission nor the parties appear to have considered this question, it appears appropriate that the facts should be determined and set forth in the Commission's report.

II

THE DISTRICT COURT WAS REQUIRED TO REMAND THE CASE BECAUSE IT IS FOR THE COMMISSION, NOT THE COURTS, TO DETERMINE IN THE FIRST INSTANCE WHETHER PROPOSED RATES ARE JUST AND REASONABLE

A remand is required, we submit, quite apart from the inadequacy of the Commission's findings. Section 1(5) of the Interstate Commerce Act (*supra*, pp. 49–50) requires that "[a]ll charges * * * shall be just and reasonable, and every unjust and unreasonable charge * * * is prohibited and declared to be unlawful." Because the Commission rejected the proposed rates on the ground of undue preference and prejudice under Section 3(1), it did not determine whether they were just and reasonable. The Commission did find that under the proposed rates "the revenue * * * would equal or exceed by a very small margin the estimated out-of-pocket costs" (R. 3797). This finding, however, related only to New York traffic. But even as to that traffic, the Commission specifically refrained from determining whether the rates would be reasonably compensatory. It indicated that the evidence needed for such a determination was lacking, saying (R. 3797):

> * * * a presentation of costs adequate to determine whether the proposed rates would be reasonably compensatory should embrace all types of traffic which those rates are expected to attract, and should reflect the costs of the specific methods by which they would be handled. It may be that other traffic would be forced to absorb a larger portion of the con-

> stant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy.

Despite the limited nature of the evidence and the Commission's refusal to pass on the issue of whether the revenues from the proposed rates would be reasonably compensatory, the district court made its own evaluation of the evidence, and held that the northern carriers had "established *prima facie* that the proposed rate schedule is just and reasonable" (R. 4001).[21] In so doing, the court plainly erred. "The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." *Florida* v. *United States*, 282 U.S. 194, 215. It is the Commission's primary responsibility to determine whether the rates are reasonably compensatory. *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481, and the court, in making its own determination, improperly invaded the province of the Commission. As this Court said in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88:

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[21] The following material was cited by the district court in support of its determination: the proposed reductions are of "minimal amounts"; the testimony that under the proposed rates the average rate per ton and revenues per ton-mile would exceed the average revenue per ton-mile for traffic in the United States; and the Commission's finding, as to New York, that "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs" (R. 4000–4001).

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

See, also, *Burlington Truck Lines, Inc.*, v. *United States*, 371 U.S. 156, 168–169; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426.[22]

The district court's action also improperly foreclosed the Commission from considering other factors which it may have deemed relevant to a resolution of the issue of whether the rates were just and reasonable. The Commission may find rates unjust and unreasonable, even though they be compensatory. See *Seandrett* v. *United States*, 32 F. Supp. 995, 996 (D. Ore.), affirmed *per curiam*, 312 U.S. 661; *New York Central Railroad Co.* v. *United States*, 207 F. Supp. 483, 494 (S.D. N.Y.).

[22] Simultaneously with the publication of the proposed reduced rates, the northern carriers sought authority from the Commission to establish these rates without observing the long-and-short haul requirements of Section 4 of the Act (R. 3740). Grant of this authority is barred, however, if the rates are not "reasonably compensatory." Since the Commission found that the proposed rates would violate section 3(1), a grant of the fourth section application was unnecessary and the Commission denied it without findings. The district court set aside the Commission's order insofar as it denied the fourth-section application (R. 4006). In doing so, the court was here, too, invading the province of the Commission.

Indeed, assuming that the court was correct in holding that Section 3(1) does not bar the rate parity, it should have afforded the Commission an opportunity to determine the legality of the proposed rates under other provisions of the Act including, as the Commission stated (R. 3805), "the national transportation policy [which] stresses the importance of maintaining a national transportation system adequate for commerce and the national defense."[24]

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[24] The district court was plainly mistaken insofar as it suggested (R. 4004–4005) that because this is not a proceeding brought on complaint (by a port, for example), alleging that the existing rates violate Section 3(1), but rather is a proceeding under Section 15(7) (*supra*, pp. 51–53) to determine the lawfulness of proposed rates, the Commission was foreclosed from finding that the failure of the proposed rates to reflect cost and distance differences violates Section 3(1). Section 15(7) in terms gives the Commission broad authority "either upon complaint or upon its own initiative without complaint" to investigate and determine "the lawfulness of such [proposed] rate * * * and after full hearing, whether completed before or after the rate * * * goes into effect * * * [to] make such order with reference thereto as would be proper in a proceeding initiated after it had become effective." Furthermore, this Court in *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 581–583, settled that both proposed rates and existing rates which create an undue preference and prejudice in violation of Section 3(1) may be cancelled in a proceeding under Section 15(7).

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and the cause remanded to the Commission for further proceedings as outlined herein.

Respectfully submitted.

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APPENDIX

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901 and 1001) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * *

Sec. 1. * * * (5) All charges made for any service rendered or to be rendered in the trans-

portation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 3(1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * *

SEC. 4(1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer

distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

* * * * * *

SEC. 15. * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge,

or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order re-

quire the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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